82 - 2084
No.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

GEORGE W. PHILLIPPI and
AVA PHILLIPPI, his wife,
Petitioners,

v.

BECHTEL ASSOCIATES PROFESSIONAL
CORPORATION, D.C., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether an assignment pursuant to § 33(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 933(b) (1976), bars an employee's third-party action where there exists specific evidence that a complex insurance scheme creates a serious conflict of interest which not only undermines the equitable nature of § 33(b), but also violates the language and purpose of § 33(d) and § 33(e)(2) of the LHWCA?

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases: **Page**

Statutes:

Miscellaneous:

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BECHTEL ASSOCIATES PROFESSIONAL
CORPORATION, D.C., et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner respectfully requests that this Court grant a Writ of Certiorari to review the *Per Curiam* Decision of the United States Court of Appeals for the District of Columbia Circuit (No. 82-1615), dismissing Petitioner's appeal from an Order of Summary Judgment issued against him, and denying a Petition for Rehearing and/or Suggestion for Rehearing *En Banc.*

OPINIONS BELOW

The District Court for the District of Columbia's Order of Summary Judgment, dated April 28, 1982, is unreported, but appears as Petitioners' Appendix C, pp. 5a-7a. The opinion of the Court of Appeals for the District of Columbia Circuit, dated February 24, 1983, from which certiorari is sought, is unreported, but appears as Petitioners' Appendix B, pp. 3a-4a. The order of the Court of Appeals for the District of Columbia Circuit, dismissing the Petition for Rehearing and/or Suggestion for Rehearing *En Banc*, dated March 30, 1983, is unreported, but appears as Petitioners' Appendix A, pp. 1a-2a.

JURISDICTION

The Court of Appeals for the District of Columbia Circuit decided this case on February 24, 1983 (App. B). A timely Petition for Rehearing and/or Suggestion for Rehearing *En Banc* was filed on March 18, 1983, and denied on March 30, 1983 (App. A). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

RELEVANT STATUTES

The relevant statutory provisions are as follows:

District of Columbia Code:

§ 36-501. Longshoremen's and Harbor Workers' Compensation Act As Made Applicable to the District of Columbia.

> The provisions of the Longshoremen's and Harbor Workers' Compensation Act, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an

> employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in implying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia and the term "employee" shall be held to mean every employee of such person.

United States Code, Title 28:

§ 1254. Court of Appeals; Certiorari; Appeal; Certified Questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

> (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

United States Code, Title 33:

§ 904(a). Liability for Compensation.

> Every employer shall be liable for and shall secure payment to his employees of the compensation payable under sections 907, 908 and 909. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to the employees of the subcontractor unless the subcontractor has secured such payment.

§ 905(a). Exclusiveness of Remedy and Third-Party Liability.

> The liability of an employer prescribed in section 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents,

dependents, next-of-kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

§ 932(a)(1)(A). Security for Compensation

(a) Every employer shall secure the payment of compensation under this Act—

(A) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this Act.

§ 933(b). Compensation for Injuries Where Third Persons Are Liable.

Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

§ 933(d). Compensation for Injuries Where Third Persons Are Liable.

> Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

§ 933(e)(1)(A)-(D). Compensation for Injuries Where Third Persons Are Liable.

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to-
> (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);
> (B) the cost of all benefits actually furnished by him to the employee under section 907;
> (C) all amounts paid as compensation;
> (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative.

§ 933(e)(2). Compensation for Injuries Where Third Persons Are Liable.

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> . . . .
>
> The employer shall pay any excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

§ 938(a). Penalty for Failure to Secure Payments of Compensation.

> Any employer required to secure the payment of compensation under this Act who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment; and in any case where such employer is a corporation, the president, secretary and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation; and such president, secretary and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said Act in respect to any injury which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by section 932 of this Act.

§ 933(a) (amended by P.L. 86-171, 73 Stat. 391, Aug. 18, 1959).

> If on account of a disability or death for which

> compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

§ 933(b) (amended by P.L. 86-171, 73 Stat. 371, Aug. 18, 1959).

> Acceptance of such compensation shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

STATEMENT OF CASE

Petitioner, George W. Phillippi, commenced the present third-party action against Respondents Bechtel on May 18, 1981 for respiratory injuries which were alleged to have been caused by the negligence of the Respondents. Petitioner was employed by several prime contractors as an underground worker on the Washington Metropolitan Area Transit Authority (WMATA) subway project during the years 1974-1979 (App. p. 9a). At the time of the diagnosis of his respiratory injuries on June 12, 1978, Petitioner was employed by the joint venture of Ball-Healy-Granite as a concrete foreman and shotcrete troubleshooter on the A6(b) Metro Subway Contract (App. p. 10a), where he came into contact with silica dust, shotcrete dust, diesel smoke and other injurious substances (App. p. 18a). Respondents Bechtel were under contract with WMATA to ensure compliance with all applicable safety regulations and codes at the WMATA construction sites. Respondents had the

responsibility to oversee safety compliance by WMATA contractors, such as Ball-Healy-Granite, and to provide overall direction and supervision of safety measures. *See Caldwell v. Bechtel, Inc.*, 631 F.2d 989 (D.C. Cir. 1980).

Subsequent to the diagnosis of his respiratory illness, Petitioner filed a workmen's compensation claim on June 23, 1978 against his employer, Ball-Healy-Granite (App. p. 16a). Under WMATA's Coordinated Insurance Program (CIP), WMATA provided workmen's compensation coverage and liability insurance for all its contractors (including Respondents Bechtel) and subcontractors (App. p. 22a), said insurance existing under a "wrap-up" policy with Lumbermen's Mutual Casualty Company (App. p. 29a). Lumbermen's Mutual, a subsidiary of Kemper Insurance Company, was selected by WMATA to provide all coverages, and thus, upon filing of the Petitioners' compensation claim, Lumbermen's Mutual undertook the defense of the claim for Ball-Healy-Granite. National Loss Control Service Corporation (NATLSCO), another Kemper subsidiary, was assigned the dual task of adjusting Metro subway claims and monitoring safety procedures in the construction of the Metro Transit System (App. p. 30a).

On September 4, 1980, a compensation award was entered by the Deputy Commissioner approving a lump sum settlement of the Petitioner's compensation claim (App. p. 11a). On May 18, 1981, the instant third-party action was commenced. Respondents Bechtel's liability coverage has been provided by Lumbermen's Mutual and adjusting services have been provided by National Loss Control Service Corp. On April 28, 1982, the District Court granted the Respondent's Motion for Summary Judgment, holding that the action was barred by 33 U.S.C. § 933(b) of the Longshoremen's and Harbor

Worker's Compensation Act, made applicable to the District of Columbia pursuant to 36 D.C. Code §§ 501-502 (1973 Ed.) (App. p. 5a). On February 2, 1983, the United States Court of Appeals for the District of Columbia Circuit rendered a *Per Curiam* Opinion affirming the judgment of the District Court (App. p. 3a). Petitioner subsequently filed a Petition for Rehearing and/or Suggestion for Rehearing *En Banc* which was denied on March 30, 1983 (App. pp. 1a, 2a).

ARGUMENT

I. PETITIONERS' THIRD-PARTY ACTION SHOULD NOT BE BARRED PURSUANT TO § 33(b), 33 U.S.C. § 933(b) (1976), WHERE SPECIFIC EVIDENCE DEMONSTRATES THAT THE WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY'S (WMATA) COORDINATED INSURANCE PROGRAM (CIP) RESULTS IN A CONFLICT OF INTEREST WHICH WAS UNFORESEEABLE WHEN CONGRESS AMENDED § 33(b).

A. WMATA's CIP Frustrates the Equitable Nature of § 33(b), 33 U.S.C. § 933(b) (1976), by Failing to Adequately Protect the Employee's Rights.

Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §§ 901-52 (1976), as applied to the District of Columbia, D.C. Code §§ 36-501 to 36-502 (1973 ed.), provides that:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. § 933(b).

Petitioners concede that the language of this provision normally precludes a claimant from filing a claim after the six-month period which follows the date of claimant's compensation award. *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981). Petitioners, however, argue that the instant case involves an insurance scheme which is so complicated as to warrant a more careful examination into the statutory mandate of § 33(b). More specifically, Petitioners note that strict compliance with the express language of § 33(b) in the instant case would yield a result contrary to Congress' intent in enacting the provision.

The legislative history of § 33(b) illustrates the equitable nature of this section in providing the employee with increased remedies for injuries. Prior to its amendment in 1938, § 33(b) limited an injured employee's remedy to *either* filing a third-party claim *or* receiving compensation from his employer. Section 33(b) clearly did not grant an employee the dual remedy of worker's compensation *and* recovery under a third-party claim. To eliminate the ultimatum which § 33(b) imposed on a claimant, Congress and this United States Supreme Court began modifying § 33(b) to provide the claimant with greater remedies. "In 1938, Congress amended [§ 33] to provide that the acceptance of compensation would operate as an assignment only if the payment was 'under an award in a compensation order filed by the Deputy Commissioner.' " *Rodriguez v. Compass Shipping Co.*, 451 U.S. at 604-605. This modification reduced the danger that an employee would make an election without knowledge of its consequences, but did nothing to mitigate the unfair consequences resulting from such an election. *Rodriguez*, 451 U.S. at 605.

In 1956, this Court initiated the revision of an injured employee's remedies under § 33(b) by allowing a third-party claim, despite the employee's acceptance of compensation under an award. *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956). The Court based its ruling on the inherent conflict of interest which stemmed from the fact that both the employer and the third party allegedly responsible for the injury were insured by the Travelers Insurance Co. Consequently, by virtue of the employee's assigned right to the employer, the employer's insurance carrier would be responsible for prosecuting and defending a third-party claim. Due to the conflict between the assignee insurance company's interest in avoiding litigation and the employee's interest in recovering on a third-party claim, "the Court construed the Act to allow the Longshoreman to enforce the third-party claim in his own name." *Rodriguez,* 451 U.S. at 606. (citing *Czaplicki,* 351 U.S. at 531). Thus, this Court has looked beyond the express statutory language of § 33(b) where rigid application of the language would lead to an improvident result.

In the same year that *Czaplicki* was decided, "a House of Representatives Subcommittee conducted hearings on proposed legislation that ultimately evolved into the 1959 amendments to the [LHWCA]" *Rodriguez,* 451 U.S. at 609. The attorney who represented Czaplicki, Nathan Baker, Esquire, testified before the House Subcommittee concerning the proposed amendment, which would enable an employee to sue within six months following the receipt of a compensation award. Criticizing the unfair election imposed upon the employee by the language of § 33(b) as it was phrased at that time, Mr. Baker attacked the pre – 1959 version of § 33(b)[1] as "unnecessary, harsh, unjust

[1]As originally enacted, and until 1959, § 33(a) read:

"If on account of a disability or death for which compensation is payable under this Act the person entitled to such

and [thwarting] the *liberal intent and beneficial objectives of compensation legislation."* Hearings Before a Special Subcommittee of the House Committee on Education and Labor on Bills Relating to the Longshoremen's and Harbor Workers' Compensation Act, 84th Cong., 2d Sess. 62 (House Hearings). Accordingly, Mr. Baker preferred the proposed amendment because "it [would] simplify the existing law and make it more equitable." House Hearings, *supra,* at 60.

Three years later, Congress passed House Resolution (H.R.) 451, H.R. Res. 451, 86th Cong., 1st Sess. (1959), the predecessor of the 1959 amendments. The House and Senate reports accompanying H.R. 451 contain language evidencing the equitable nature of the 1959 amendments. The House of Representatives Report on H.R. 451, H.R. Rep. No. 229, 86th Cong., 1st Sess. (1959), explained that "[t]he purpose of H.R. 451 is to rectify a hardship which under the present law is suffered by harbor workers, longshoremen, and their survivors." H.R. Rep. No. 229, *supra,* at 1. Echoing the conclusions of the House, the Senate Report stated the purpose of the bill as revising

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compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person." 44 Stat. (part 2) 1440.

The original § 33(b) provided:

"Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election." 44 Stat. (part 2) 1440.

Rodriguez, 451 U.S. at 604 nn. 14 & 15.

"section 33 . . . so as to permit an employee to bring a third-party liability suit without forfeiting his right to compensation." S. Rep. No. 58, 86th Cong., 1st Sess., 2 (1959), *reprinted in* 1959 U.S. Code Cong. & Ad. News 2134, 2135. Moreover, as the report specified "the principle would be applied with due recognition of the equities and rights of all who are involved." S. Rep. No. 58, *supra,* at 2. Lastly, the report noted that "[t]he bill as amended by the committee provides *greater protection to injured workers* and corrects defects in existing law. It carefully *protects the interests of all* who are involved and *balances the equities." Id.* (emphasis added). Thus, the legislative history of the 1959 amendments to § 33(b) supports Petitioners' argument that this Court should construe § 33(b) in accordance with the equitable nature of the 1959 amendments.

In 1972, Congress narrowed the basis for litigation stemming from third-party liability.[2] Despite the 1959 and 1972 amendments aimed at clarifying third-party liability, federal decisions went beyond the language of the 1959

[2]The *Rodriguez* decision noted three ways in which the 1972 amendments narrowed the area of potential litigation under § 33.

> First, the level of benefits was substantially increased, thereby increasing the likelihood that the statutory compensation recoverable without proof of fault would be adequate. Second, the shipowner's right to seek indemnity from the stevedore under *Ryan Stevedoring v. Pan Atlantic S.S. Corp.*, 350 U.S. 124 (1956) was eliminated, thereby removing a category of litigation from the courts, placing more definite limits on the stevedore's insurance costs, and removing a potential source of conflict between the interests of employers and employees. Third, the shipowner's nearly absolute liability for unseaworthiness was eliminated, thereby further narrowing the area of potential litigation and increasing the relative importance of statutory awards as the favored method of compensation.

Rodriguez, 451 U.S. at 616.

amendments and allowed third-party suits after the expiration of the six-month statutory assignment period. *See Caldwell v. Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980) (holding that the employer retains a right after assignment to compel the assignee either to bring suit or to reassign the cause of action to the employee in response to a formal request to do so); *Potomac Electric Power Co. v. Wynn*, 343 F.2d 295 (D.C. Cir. 1965) (holding that a longshoreman who has accepted compensation may maintain a third-party action whenever it becomes evident that his employer has no intention to file suit on the assigned claim). In *Rodriguez v. Compass Shipping Co.*, this Court ruled that the language of § 33(b), as amended in 1959, was unequivocal and mandated that plaintiffs longshoremen were precluded from pursuing their third-party claims after assignment of the claims to their employers, despite the employers' failure to bring suit on the assigned claims. The *Rodriguez* decision noted that the 1959 amendments superseded the *Czaplicki* decision, and consequently, limited *Czaplicki* to its "peculiar facts", which occurred before the 1959 amendments. *Rodriguez*, 451 U.S. at 607. *Rodriguez*, however, did not overrule the *Czaplicki* decision.[3] The Court further held that the denial of Petitioners' third-party claim was consistent with the 1972 amendments' narrowing of potential litigation under the LHWCA. *Id.* at 616-17. Most importantly, the *Rodriguez* decision carved out an exception to its holding, which

[3]This Court recently affirmed the continuing vitality of the *Czaplicki* decision in *Pallas Shipping Agency, Ltd. v. Duris*, No. 82-502, slip op. at 3 n. 1 (S. Ct. May 23, 1983). The Federal District Court for the Eastern District of New York has also cited *Czaplicki* as valid precedent for the proposition that an employee may sue its employer after the six-month statutory assignment period in certain conflict of interest situations. *Susino v. Hellenic Lines, Ltd.*, 551 F. Supp. 1080, 1083 (E.D.N.Y. 1982).

precludes "a longshoreman's third-party action if there is specific evidence of a serious conflict of interest Congress could not have foreseen when it enacted and amended § 33(b)" from being bound by the Court's decision. *Id.* at 618.

Petitioners submit that the CIP comes within this exception. The system-wide insurance scheme at issue in the present case goes beyond the scheme in *Czaplicki.* Presented in this case is a statutory provision requiring the employer to pay compensation insurance for its employees. Under the umbrella insurance scheme engineered by the Washington Metropolitan Area Transit Authority (WMATA), the Authority itself provides compensation coverage for all its contractors and even subcontractors. In enacting and amending § 33(b), Congress did not take into account a commercial venture incorporating the massive construction of the Metro subway system. Nor did Congress anticipate a venture which would lead to the creation of an insurance scheme which necessarily frustrates the rights given injured workers under §33(d) and § 33(e). The legislative history of the Act shows that Congress' overriding concern was with preserving the rights of the longshoremen. The CIP at issue here is designed to take some of the statutory rights away. In the instant case, the umbrella carrier, Lumbermen's Mutual, is the sole beneficiary of a § 33(b) assignment under the insurance scheme. The injured workers' post assignment rights simply perish. Since Lumbermen's Mutual also provides insurance for the third party, Bechtel, the carrier withholds prosecution of the assigned third-party claim which enables it to avoid further financial exposure. The resulting conflict of interest in the present case stems from a deliberate and mandatory insurance scheme, and goes beyond the conflict of interest in *Czaplicki* because it was deliberately created.

B. To Bar Petitioner's Third-Party Claim Against Respondents, Bechtel, Would Violate the Language and Purpose of § 33(d), 33 U.S.C. § 933)d) (1976), and § 33(e)(2), 33 U.S.C. § 933(e)(2), of The Longshoremen's and Harbor Workers' Compensation Act, (LHWCA), 33 U.S.C. §§ 901-52 (1976).

Petitioners contend that the carrier's failure to prosecute such an action not only interferes with Petitioners' rights under § 33(b), but also violates the language and purpose of other sections contained in the LHWCA. More specifically, the CIP dilutes the effect of § 33(d) and § 33(e)(2). As a result, Petitioners argue that Congress could not have foreseen a conflict of interest, such as that in the present case, which would circumvent the purpose of other provisions in the LHWCA.

Section 33(d) of the LHWCA states that "[s]uch employer on account of such assignment may *either* institute proceedings for the recovery of such damages *or* may compromise with such third person either without or after instituting such proceeding." 33 U.S.C. § 933(d) (emphasis added). Petitioners note that a strict interpretation of § 33(d) mandates that, upon assignment of the employer's claim, an employer must take some action to pursue the employee's third-party claim. Although § 33(d) does mandate some action by the employer, the language of this subsection is flexible in providing the employer with two means of pursuing the third-party claim: compromising with the third party or initiating a suit against the third party. In the present case, the CIP necessarily results in the abandonment of all third-party rights, since one deep pocket has been deliberately created by the plan. Thus, Congress' intent is necessarily frustrated since

Lumbermen's Mutual has no interest or intention of performing either of its statutory duties under § 33(d).

A second subsection, § 33(e)(2), 33 U.S.C. § 933(e)(2), further encourages the pursuit of the assigned claim by endowing the employer with a monetary interest in the employee's claim. Prior to the 1959 amendments, § 33(e)(2) merely required the employer to "pay any excess [recovery] to the person entitled to compensation or to the representative". 33 U.S.C. § 933(e)(2) (1927), *amended by* Pub. L. 86-171, 73 Stat. 391 (1959). Upon the enactment of the 1959 amendments, § 33(e)(2) was amended to read as follows: "The employer shall pay any excess . . . to the person entitled to compensation..., *less one-fifth of such excess which shall belong to the employer.*" 33 U.S.C. § 933(e)(2) (1976) (emphasis added). Thus, consistent with this equitable nature of the 1959 amendments, Congress added language which would encourage the employer to pursue an employee's third-party claim. In the event of recovery, the amended language rewards the employer with twenty percent (one-fifth) of that portion of the third-party recovery not already allocated to the employer under § 33(e)(1).[4]

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[4]Section 33(e)(1), which has not undergone any significant changes since its enactment in 1927, allows the employer to meet the expenses it pays as compensation and the cost it incurs in pursuing the employee's third-party claim. The section reads as follows:

> (e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to-
>
> (A) the expenses incurred by him in respect to such pro-

Contrary to the language and intent of § 33(d) and § 33(e)(2), WMATA's insurance scheme actually encourages the employer not to bring suit. Because WMATA's CIP is specifically designed to end the need for subrogation suits, the provisions of § 33(d) and § 33(e)(2) are made meaningless for all injuries which are covered by the plan. In amending § 33(b), Congress clearly could not have foreseen a scheme which undermines other subsections of § 33. The different provisions of § 33 can only be examined as a whole, for this section contains an entire network of checks and balances designed to protect *both* the interests of the injured worker and his employer. WMATA's insurance plan interferes with this statutory plan by rendering meaningless the provisions of § 33(d) and § 33(e), which protect the rights of the employee even after a statutory assignment under § 33(b).

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ceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);
(B) the cost of all benefits actually furnished by him to the employee under section 907;
(C) all amounts paid as compensation;
(D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 907, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a strust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative.

33 U.S.C. § 933(e)(1)(A)-(D).

CONCLUSION

Petitioners, George and Ava Phillippi, respectfully request that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1615 September Term, 1982

George W. Phillippi
Ava Phillippi, his wife
Appellants

Civil Action No. 81-01154

FILED MAR 30 1983
GEORGE A. FISHER
Clerk

v.

Bechtel Associates Professional
Corporation, D.C., et al

ARGUED 1-7-83

BEFORE: Robinson, Chief Judge; MacKinnon and Edwards, Circuit Judges

ORDER

On consideration of petitioners' petition for rehearing, filed March 18, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1615 September Term, 1982

George W. Phillippi,
Ava Phillippi, his wife
Appellants
v.

Civil Action No. 81-01154

FILED MAR 30 1983

GEORGE A. FISHER
Clerk

Bechtel Associates Professional
Corporation, D.C., et al.

ARGUED 1-7-83

BEFORE: Robinson, Chief Judge; Wright, Tamm, MacKinnon, Wilkey, Wald, Mikva, Edwards, Ginsburg, Bork and Scalia, Circuit Judges

ORDER

Petitioners' suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

George A. Fisher,
Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX B

NOT TO BE PUBLISHED – SEE LOCAL RULE 8(f)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1615 September Term, 1982

GEORGE W. PHILLIPPI and
AVA PHILLIPPI, his wife,
Appellants,

v.

BECHTEL ASSOCIATES PROFESSIONAL
CORPORATION, D.C., et al.,
Appellees.

Appeal from the United States District Court for the the District of Columbia.

Before: ROBINSON, MacKINNON and EDWARDS,
Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal from the United States District Court for the District of Columbia and was briefed and argued by counsel.

The issues presented have been accorded full consideration by the court; they occasion no need for an opinion. *See* Local Rule 13(c).

On consideration of the foregoing, it is ORDERED and ADJUDGED that the judgment of the District Court appealed from in this cause is hereby affirmed for reasons set forth in the Memorandum of the District Court filed on April 28, 1982.

It is FURTHER ORDERED that the Clerk shall withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* Local Rule 14, as amended on November 30, 1981 and June 15, 1982.

Per Curiam

For the Court

/s/ George A. Fisher
George A. Fisher

Bills of costs must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE W. PHILLIPPI, and AVA PHILLIPPI, his wife, Plaintiffs,	)	
v.	)	Civil Action No. 81-1154
BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*, Defendants.	)	

MEMORANDUM

Plaintiffs are husband and wife. While employed by Ball-Healey-Granite Corporation ("B-H-G") as a mining foreman at a Washington Metropolitan Area Transit Authority ("WMATA") construction site, plaintiff suffered disabling injuries, and obtained a workmen's compensation award pursuant to 36 D.C. Code § 501 (1973 ed.). Defendants ("Bechtel") are firms that had contracted to ensure job safety at work sites where plaintiff was employed. Under governing provisions of Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 933(b), a worker receiving an award assigns any claim for his injuries against a third party to his employer, unless he commences suit against the third party within six months of the award. Undisputed facts show that plaintiff did not commence this action against Bechtel until after the six-month period had expired. The matter is now before the Court on defendants' motion for summary judgment. The principal ground of defendants' motion, and the only one the Court must reach, is that plaintiffs' claims are barred by the statute of limitations embodied in 33 U.S.C. § 933(b).

For reasons stated by Judge Flannery in *Jenkins v. Bechtel Associates Professional Corporation,* Civil Action No. 81-2236 (D.D.C., Feb. 23, 1982), plaintiff's claim is time-barred by Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act because plaintiff did not bring this suit until more than six months after he received a compensation award. *Rodriguez v. Compass Shipping Co., Ltd.,* 101 S.Ct. 1945 (1981); *cf. Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956).

Plaintiff seeks to distinguish *Jenkins* and *Rodriguez* on the theory that this controvery presents "unusual conflict of interest problems, such as . . . identified in *Czaplicki* . . ." *Rodriguez v. Compass Shipping Co., Ltd., supra,* 101 S.Ct. at 1955 n. 30. Discovery conducted by plaintiff by leave of Court disclosed that WMATA had contracted with National Loss Control Service Corporation, as well as defendants, for supervision of job safety during construction of WMATA's subway project and to adjust workmen's compensation claims. In furtherance of this workmen's safety program WMATA paid the premiums for both workmen's compensation and liability insurance for all of the contractors, including plaintiff's employer and Bechtel. The same carrier covered the workmen's compensation and liability insurance for WMATA and its contractors, including B-H-G and Bechtel. The carrier was aware of defendants' role *vis a vis* plaintiff by virtue of its processing of workmen's compensation claims through National Loss Control Service Corporation.

Plaintiff contends that his workmen's compensation claim was filed and pursued without knowledge that defendants had a responsibility with respect to the injury and, more important, that defendants, through the nexus of National Loss Control Service Corporation, knew of their responsibility to plaintiff and withheld that

knowledge . He claims he was unaware of his potential rights against defendant until April 1981, and that defendants constructively concealed from him the existence of his claim against them. These "extraordinarily complex contractual arrangements," he argues, created a conflict of interest which tolled the statute of limitations. *See Rodriguez v. Compass Shipping Co., Ltd., supra,* 101 S.Ct. at 1955 n. 30.

While the arrangements appear complex, there is no suggestion that their complexity was a product of any ulterior motive. They are a side-effect of an ordinary business necessity of a large undertaking. Moreover, there is no authority for the plaintiff's contention that the defendants, National Loss Control Service Corporation or the insurance carrier had any legal duty to inform plaintiff about evidence of the role of the insured defendants. *Cf. Caldwell v. Bechtel,* 631 F.2d 989 (D.C. Cir. 1980).

Accordingly, an accompanying Order will grant defendants' motion for summary judgment.*

/s/ Louis Oberdorfer
UNITED STATES DISTRICT JUDGE

*Plaintiffs' argument that Mrs. Phillippi's claims are not precluded even if her husband's claims are barred is inconsistent with 33 U.S.C. § 905(a), which appears to make a spouse's claims under the Act derivative of those of the injured worker. *Cf.* Smither & Co. v. Coles, 100 U.S.App.D.C. 68, 72-73, 220 F.2d 220, 224-25, *cert. denied,* 354 U.S. 914 (1957).

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GEORGE W. PHILLIPPI, and AVA PHILLIPPI, his wife, Plaintiffs,	)	
vs.	)	Civil Action No. 81-1154
BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*, Defendants.	)	Judge Oberdorfer

Washington, D.C.
Friday, March 12, 1982

Deposition of:

GEORGE W. PHILLIPPI,

a plaintiff, called for examination by Defendants and Third-Party Plaintiffs, pursuant to Notice and agreement of the parties as to time and date, beginning at approximately 10:00 o'clock, a.m., in the law offices of Macleay, Lynch, Bernhard, Gregg & Attridge, Esquires, 1625 K Street, Northwest, Washington, D.C. 20006, before Carol J. Thomas, a Notary Public in and for the District of Columbia, when were present on behalf of the respective parties:

* * *

A. No, sir.

Q. So, you were in pretty good health up until — A. This just lasted — it was more or less temporary. After I took the medicine it got better, and I didn't really have a whole lot of trouble after that until later on until I had — well, later on I had trouble.

Q. In 1976 did you have a regular physician? A. No, sir, not really.

Q. Where you live do you have a regular physician? A. Dr. Marinus is a doctor that I use. That's in Fries, Virginia.

Q. How long have you been under the care of Dr. Marinus? A. Well, I could probably say – you know, when I use a doctor – well, I guess when I've been home, I guess I could say, for the last 10 years off and on.

Q. But, you try to stay out of the doctor's office? A. I try.

Q. What about physical examinations? Do you have regular physical examinations? A. I've had several the last few years.

Q. When did you first come up here to start work on the Metro? A. It was in '74, I think.

Q. Do you recall when you had a physical exam in either 1974 or before that? A. I'm not sure. I think I had a physical before I started the job for Ball-Healy. I think they required a physical.

Q. Do you recall what doctor performed the physical for Ball-Healy? A. No, sir, I don't. I'm not sure. I'm just saying that I think we had a physical before we started the job. I'm not saying for sure, and I'm not – I wouldn't say for sure, but I think it was at a clinic here somewhere, Workmen's Clinic, or something like that maybe.

Q. That would be sometime in 1974? A. Yes, I would say '74.

Q. After '74, when is the next time you had a regular physical examination? A. Well, that would be actually hard to say. I can't recall.

Q. While you were working for Ball-Healy did you ever ask them to arrange for a physical exam for you? A. No, I never asked them to.

* * *

A. February of '80.

Q. Excluding a couple of months? A. Excluding about two or three months.

Q. During that whole period of time were you a concrete foreman? A. That was my – they classified me as a concrete foreman, and then after I finished that crossover I went to work as a shotcrete troubleshooter, and I kept the same title, but my work was with shotcrete then.

Q. The shotcrete operation that you were troubleshooting was in the stations; is that right? A. It was in the stations.

Q. You worked in all three? A. Right.

Q. You started working in Cleveland Park; is that right? A. Cleveland Park – like I say, that's where I worked – I worked at all three of them. I would spend like two or three hours in each one of the stations there troubleshooting, helping with the equipment if the equipment went down, or helped the nozzlemen try to – if they had any problems.

I wasn't classified as a foreman, but I was drawing foreman's pay. I wasn't a foreman then.

Carol J. Thomas, R.P.R.
Stenotype Reporting Service
3162 Musket Court
Fairfax, Virginia 22030
273-9221 – 273-9222

APPENDIX E

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs

GEORGE W. PHILLIPPI
Claimant

v.

TRAYLOR BROTHERS & BALL-HEALY-GRANITE
Employer

LUMBERMEN'S MUTUAL CASUALTY COMPANY
Insurance Carrier

COMPENSATION ORDER
APPROVAL OF AGREED SETTLEMENT – Section 8(i)(A)
CASE NOS. 126207, 131186, 126918 and 125864

Pursuant to agreement and stipulation by and between the interested parties, and such further investigation in the above entitled claim having been made as is considered necessary, and no hearing have been applied for by any party in interest, or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. In September, 1975, the claimant, George W. Phillippi, alleges that he injured his shoulder in the course of his employment with Traylor Brothers S & M. No report of injury was made, and no doctors were seen as a result of this injury.

2. On April 10, 1978, the claimant injured his back in the course of his employment with Ball-Healy-Granite. Claimant missed work from May 15, 1978 through July 26, 1978. Compensation was paid based upon an average weekly wage of $646.38 per week. The claimant returned to his regular employment following this injury.

3. On June 12, 1978, the claimant was found to have restrictive pulmonary impairment of approximately 10% by Dr. David Simon. Dr. Simon at that time recommended that the claimant not work underground as a miner since smoke and dust was an aggravating factor and would only cause his lung condition to deteriorate. Since that time, claimant has continued to work at his regular employment but has worked above ground. Claimant has lost considerable amounts of overtime because he no longer works in the tunnel.

4. On October 27, 1978, the claimant was found to have a hearing loss which Dr. Max Fischer stated was work-related. With regard thereto, Doctors Richard Israel and Sidney Jaffee find no compensable hearing loss as a result of the tests they performed.

5. The liability of both employers for compensation under the Act was insured by Lumbermen's Mutual Casualty in all of the above injuries.

6. Under these circumstances, the employer has agreed to pay, and the claimant has agreed to accept, a lump sum of $60,000.00 in settlement of the above-captioned workmen's compensation cases. Said amount is in addition to amounts previously paid.

7. The parties believe that the said agreed settlement is being made in his best interests.

8. The parties further agree that the said settlement is being made without prejudice to the claimant's right to continue to receive medical services for any conditions which are causally related to his injuries above-mentioned.

9. The Deputy Commissioner, pursuant to the authority vested in her in Section 8(i)(A) of the Longshoremen's and Harbor Workers' Compensation Act, as amended,

finds that it is in the best interest of the employee, approves the agreed settlement, and effects a final disposition of his claim, discharging the liability of the employer and insurance carrier for such compensation.

10. An attorney's fee in the amount of $12,325.00 including $850.00 for medical bills, is hereby approved in favor of the firm of Ashcraft & Gerel. This fee is payable out of compensation due the claimant.

ORDER

It is ORDERED that the employer and insurance carrier shall pay forthwith all amounts due in accord with the settlement agreement.

Given under my hand and filed at Washington, DC this 4th day of September, 1980

/s/ Janice V. Bryant
JANICE V. BRYANT
40th Compensation District

CERTIFICATE OF FILING AND SERVICE

I certify that on September 4, 1980 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, 40th Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

George W. Phillippi, 6018 Vista Drive
Falls Church, Virginia 22041

Claimant

Lumbermen's Mutual Casualty, 8316 Arlington
Boulevard, Fairfax, Virginia 22030

Insurance Carrier or Employer (if self-insured)

A copy was also mailed by regular mail to the following:

Director, Office of Workers' Compensation Programs, (LHWCA), U.S. Department of Labor, Washington, D.C. 20211

William F. Mulroney, Esquire
2101 L Street, NW, Suite 303
Washington, DC 20037

Thomas G. Hagerty, Esquire
#22 W. Jefferson Street
Rockville, Maryland 20850

/s/ Janice V. Bryant
JANICE V. BRYANT
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 percent thereof. The ad-

ditional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date the Deputy Commissioner files the decision or order in his office.

FORM LS-19a
Sept. 1974

Office of the Deputy Commissioner
U.S. Department of Labor
Office of Workers' Compensation Programs
1717 K Street, N.W.
Washington, D.C. 20211

RE: File No. _____
Claimant George W. Phillippi, Jr.
Employer Ball-Healy-Granite
Accident Date June 12, 1978

Gentlemen:

This is to notify you that I am hereby making claim for workmen's compensation benefits and am filing this claim with you in accordance with Sections 13 and 19 of the Longshoremen's and Harbor Workers' Compensation Act, as extended, by the District of Columbia Workmen's Compensation Act.

I was injured while I was working at Shaft #4, Connecticut Avenue, N.W.

The accident occurred when I was exposed to dust

I sustained the following injuries: lungs

Please be advised that I have retained Ashcraft, Gerel & Koonz to represent me in this claim, and it is understood

that any attorney's fee will be approved by the Office of Workers' Compensation Programs.

Very truly yours,

Date: June 23, 1978

/s/ George W. Phillippi, Jr.
Claimant

Attorney handling case:

__ Lee C. Ashcraft
__ Joseph H. Koonz, Jr.
__ James A. Mannino
__ Mark L. Schaffer
__ Robert B. Adams
__ Wayne M. Mansulla
__ James F. Green
XXX William F. Mulroney
__ Carolyn M. Endress
__ David M. LaCivita

ASHCRAFT, GEREL & KOONZ
Attorneys at Law
2101 L Street, N.W., Suite 303
Washington, D.C. 20037
Telephone: 783-6400

HAROLD M. SILVER, M.D., P.C.
DAVID B. SIMON, M.D.
1601 - 18TH STREET, N.W.
WASHINGTON, D.C. 20009

TELEPHONE 667-0134

June 12, 1978

William F. Mulroney
Ashcraft, Gerel & Koonz
2101 L Street, N.W.
Washington, D.C. 20037

RE: George W. Phillippi, Jr.

Dear Mr. Mulroney:

Mr. Phillippi was seen for evaluation on June 2, 1978. He is a thirty-one year old white male with a COMPLAINT of sneezing and coughing of one year duration. He has discomfort in the center of his chest on coughing and has been raising black sputum for over one year. He denies any shortness of breath. There is no past history of pneumonia, asthma or tuberculosis. He has no known allergies. He is employed in underground construction, primarily as a concrete and shotcrete foreman. He is currently working for Ball, Healy, and Granite on the Connecticut Avenue Metro project. He has been employed there for about one year. Previously, he was with S & M Construction doing similar work. Besides exposure to concrete and shotcrete, he is also exposed to other tunnel dusts, such as rock dust and diesel smoke. He occasionally wears a respirator, but finds that it impairs his breathing and it has also caused a rash on his face. He has been doing similar construction work for about ten years. About one year ago, he was told of having a "lung infection" and was treated as an out-patient by the Jefferson Community Hospital in Arlington. He currently is taking no medications. He is a non-smoker. He has been off work for

approximately three weeks, secondary to a back injury sustained during a fall. He was born in Wood County, Virginia, and has no farm or factory exposure.

PERSONAL HISTORY: Has a high school education. Was in the service from 1966-1967, stationed in the United States, mostly in Oklahoma. He is married, has two children, ages 9 years and 10 months. Drinks no alcohol; follows no special diets; has been sleeping poorly recently, due to his back injury. His weight is fairly stable at 200 pounds.

FAMILY HISTORY: Mother 68 years old, alive and well; father 58 years old, in fair health, is under treatment for diabetes. Four brothers and three sisters, are alive and well.

PAST MEDICAL HISTORY: Usual childhood diseases, denies rheumatic fever and scarlet fever. No surgery; sustained a neck injury about two years ago.

REVIEW OF SYSTEMS: Denies headaches.

Eyes: Without complaint.

Ears: Decreased hearing bilaterally.

Gastrointestinal: Treated for a nervous stomach as a teenager.

Neuromuscular: Dislocated right shoulder three years ago, but did not seek medical attention.

PHYSICAL EXAMINATION: Well-developed, over weight white male in no distress; alert and cooperative. Temperature 98.6; pulse 72; respirations 16; blood pressure, right arm 130/90, left arm 130/90; weight 209 pounds; height 69".

Skin: Warm, moist, no lesions.

Head, eyes, ears, nose and throat: Within normal limits.

Neck: Supple, no lymphadenopathy; carotid pulses equal. Thyroid within normal limits.

Heart: Regular rhythm, 72 per minute. No murmur, rub or gallop.

Lungs: Clear to percussion and auscultation.

Abdomen: Flat, soft, nontender. Liver, spleen and kidneys not palpable; no masses.

Extremities: Pulses within normal limits. No clubbing or edema.

Bones and joints: Within normal limits.

Neurologic: Within normal limits.

LABORATORY DATA:

Urine analysis: Appearance amber clear, specific gravity 1.020; pH 7; albumen negative; glucose negative; microscopic negative.

Hemoglobin: 17.4; hematocrit 51.6; WBC 5,900; segs 54; lymphs 36.

SMA-12: Showed all values within normal limits except bilirubin which measured 1.7 milligrams %.

ELECTROCARDIOGRAM: Rhythm sinus; rate 58 per minute; PR interval 0.16 seconds; QRS duration 0.07 seconds; QT intervals 0.42 seconds. Interpretation: Within normal limits.

CHEST X-RAY: The heart is of normal size and configuration with a CT radio of 15/32. The right hemidiaphragm is elevated, the lung fields appear clear.

PULMONARY FUNCTION TESTING: Performed with a fairly good degree of cooperation. The vital capac-

ity is mildly reduced, the timed vital capacities are within normal limits and the maximum voluntary ventilation is moderately reduced. Post-bronchodilator: there is no significant change in the values measured. Interpretation: mild restrictive impairment.

IMPRESSIONS: (1) Chronic bronchitis
(2) Restrictive pulmonary impairment of undetermined origin; rule out pneumoconiosis.

COMMENT: Mr. Phillippi has a history consistent with chronic bronchitis for the past year, namely daily cough productive of sputum. Since he is a non-smoker and has no allergic background, it appears most likely that this is a result of the various dust and exhaust irritants to which he is exposed at work. Of some concern is the finding of mild restrictive impairment on pulmonary function testing. This may be due to his moderate overweight condition, but at his age this is usually not the case. There were no findings on x-ray diagnostic of pneumoconiosis; however, at an early stage there may be no findings on x-ray, but this degree of pulmonary impairment seems somewhat out of proportion. Perhaps this would be best be evaluated by a loss of weight and repeat pulmonary function in some four-to-six months.

Thank you for referring Mr. Phillippi for evaluation.

Sincerely yours,

/s/ David B. Simon
David B. Simon, M.D.

DBS:rss

PLAINTIFF'S EXHIBIT #8
C.A. #82-1030

SPECIFICATIONS OF THE COORDINATED INSURANCE PROGRAM OF WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

(November 1973 Edition)

INTRODUCTION

The Coordinated Insurance Program is a method of guaranteeing that all contractors and subcontractors of whatever tier and the Washington Metropolitan Area Transit Authority are covered for Statutory Workmen's Compensation-Employer's Liability Insurance (D.C. benefits), Comprehensive General Liability, including Products Insurance & All Risk Builders Risk Insurance. These policies DO NOT cover automobile liability insurance, and this coverage must be secured by the contractor at his own expense and through his own efforts. Appendices A, B & C of this document provide the primary policies of the Coordinated Insurance Program made available to contractors and subcontractors by WMATA. Excess policies, referred to on Page 4, Section C, are also purchased by WMATA. Copies are available for inspection at the offices of Metro Insurance Administrators. The contractors may, at their own expense and effort, obtain any other insurance they deem necessary.

Insurance premium costs for the coverages provided are paid by WMATA and contractors are expected to recognize this fact when submitting their bids.

Any questions pertaining to these Insurance Specifications should be directed to:

Director
Metro Insurance Administrators
955 N. L'Enfant Plaza, S.W., Suite 6077
Washington, D.C. 20024

Telephone: 202, 484-3166

C. *Excess Liability Insurance* – $45,000,000 each accident or occurrence/$45,000,000 annual aggregates in excess of the underlying limits and terms as set forth in Appendices A and B and limits available to the Washington Metropolitan Area Transit Authority under certain other policies. Regardless of the amount of any claim for damages; the number of insureds covered; or the number of underlying policies, the total limit of the excess coverage provided shall not exceed $45,000,000 for all damages arising out of one accident or occurrence.

D. *Builders Risk Insurance* – limit of $30,000,000 in the form and subject to the provisions of Appendix C. The portion of any loss falling within the deductible provisions specified in Appendix C will be self-insured by the Authority for the benefit of all insureds under the Authority's insurance policies, except that the Contractor and/or his subcontractor(s) will be responsible for the first $10,000 of any claim(s) arising out of one occurrence in which the Contractor and/or his subcontractor(s) have an insurable interest.
See Appendix C for full policy wording

E. *Railroad Protective Liability Insurance* – as required and in connection with a contractor's performance on railroad property under his contract. *NOTE:* Certificates of Insurance evidencing the above coverages will be issued as required on behalf of those contractors and subcontractors covered by the policies.

SPECIAL PROVISIONS OF THE INSURANCE PROGRAM

A. Contractor shall, within 60 days after the award of the contract, supply the Contracting Officer with a lump sum estimate of all wages, *excluding fringe benefits,* to be reported under the Davis-Bacon Act (40 U.S.C. 276-a(7)) during the performance of this contract including wages of the contractor and subcontractor of any tiers.

B. The insurance by WMATA (except for the All Risk Course of Construction Insurance) applies only to the operations of, and for, each contractor at and from the construction site and any other approved site. It does not apply to the operations of any contractor in his regularly established main or branch office, factory, warehouse, or similar place nor to any employees of such operations.

C. Loss, if any, covered by All Risk Course of Construction Insurance is to be made adjustable with and pay able to the Authority.

D. The Authority reserves the right to change the terms and conditions of its Insurance Program, provided, however, that no changes may be made which, in the opinion of the Authority, substantially reduce the coverage set forth in these Insurance Specifications.

E. If any insurance company providing coverage cancels such insurance, the Authority shall give all contractors insured thirty (30) days written notice of cancellation. In the event of such cancellation, the Authority shall, at its option, at least five days prior to the effective date of cancellation:

procure alternate insurance coverage for the policy

or policies cancelled; or require contractor to procure and maintain alternate insurance coverage for the policy or policies cancelled, the amounts, policy wording and insurance company shall be satisfactory to the Authority. Authority will reimburse contractor for the actual premiums for contractor's alternate insurance coverage. In the event of such cancellation, these Insurance Specifications shall remain in full force and effect except for those portions which in the opinion of the Authority, conflict with said alternate insurance coverage.

F. Assignment – Upon the request of the Contracting Officer, the contractor and each of his subcontractors shall execute an assignment for the benefit of the Authority, in a form to be approved by the Authority, of any return premiums, premium refunds, dividends and any other moneys due or to become due in connection with the insurance which the Authority herein agrees to provide.

G. There is no other type of insurance and no higher limits than those described herein. Any increase in limits of liability or any other type of insurance not described above which the contractor or any of his subcontractors obtain for their own protection or because of statute shall be their own responsibility and at their own expense.

H. The contractor and his subcontractors shall cooperate with and assist in every possible manner the representatives of the Authority, its consultants, insurance representatives and the insurers of the policies described in the Specifications with respect to:

1. The implementation of the Authority's Coordinated Safety and Loss Control Program; and

2. The adjustment of all claims arising out of operations within the scope of the contract, including the litigation of such claims.

I. The contractor shall at all times cooperate with and assist the insurance companies issuing any of the policies of insurance mentioned in the Specifications in the preparation of all necessary pertinent payroll audits for the purpose of developing and determining all premiums thereunder, and shall keep records relating to the contract work in such manner that said records can readily be separated from other work the contractor is doing. In order to enable the Authority to verify the premiums to be developed by the insurance companies, the contractor shall make available to insurance company's auditors, at the construction site, all payroll data for the contract work for the period being audited.

J. The provisions of the Insurance Specifications as described shall apply to the contractor and his subcontractors of any tier, and these Insurance Specifications shall be incorporated in any contract or agreement between the contractor and subcontractors of any tier who perform work under this contract.

K. Prime Contractors are required to notify the Metro Insurance Administrators (MIA) of the award of any subcontract of whatever tier for the performance of operations at construction site. The notices to MIA should be made on Prime Contractor's letterhead, numbered consecutively, follow the form and contain the information as outlined below:

LETTERHEAD OF PRIME CONTRACTOR

Metro Insurance Administrators
955 N. L'Enfant Plaza, Suite 6077
Washington, D.C. 20024

Re: WMATA Prime Contract No.__
Letter Number _____
Notice of Contract Award and
Request for Insurance

Gentlemen:

A contract has been awarded to the contractor named below:

NAME OF CONTRACTOR: _____

ADDRESS OF CONTRACTOR: _____

TYPE OF WORK: _____

REPRESENTATIVE: _____ TELEPHONE NO. _____

DATE OF CONTRACT: _____

ESTIMATED CONTRACT AMOUNT: _____

PROBABLE STARTING DATE: _____

Please send Certificates of Insurance or policies evidencing coverage to the above named contractor.

PRIME CONTRACTOR

By _____

APPENDIX F

AGREEMENT
Among
WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,

LUMBERMENS MUTUAL CASUALTY COMPANY,

and

NATIONAL LOSS CONTROL SERVICE
CORPORATION

Agreement made as of the 30th day of July, 1971, among Washington Metropolitan Area Transit Authority, a public authority ("WMATA"), Lumbermens Mutual Casualty Company, an Illinois mutual insurance company ("LMC"), and National Loss Control Service Corporation, an Illinois corporation ("NATLSCO").

Witnesseth:

Whereas, WMATA issued specifications for a Coordinated Insurance Program dated April, 1971; and

Whereas, in response thereto LMC submitted to WMATA and Metro Insurance Administrators (MIA) a proposal (attached as Appendix A hereto) to provide workmen's compensation and general liability insurance, at a price and upon terms therein stated; and

Whereas, NATLSCO submitted to WMATA and MIA a proposal (attached as Appendix D hereto) to provide workmen's compensation and general liability insurance claim and loss control service at a price and upon terms therein stated; and

Whereas, WMATA desires to accept the said proposals of LMC and NATLSCO,

Now, Therefore, in consideration of the mutual promises herein contained, the parties hereto agree as follows:

SECTION A. LMC AGREES:

1. To provide workmen's compensation insurance and general liability insurance in substantial conformity with WMATA's specifications above described, subject to the terms stated in LMC's proposal set forth in Appendix A hereto. Policies for such insurance shall be issued to become effective at 12:01 A.M., EDT, July 30, 1971 unless otherwise agreed upon by the parties hereto. The premium for such insurance shall be calculated and paid in the manner set forth in Appendix A hereto.

2. To include Bechtel Corporation as an insured under the workmen's compensation and general liability policies aforesaid on one of the three alternatives set forth in Appendix B hereto, to be selected by WMATA. Provided, however, in the event WMATA fails to inform LMC of its selected alternative within 30 days from the date of this Agreement, alternative A in Appendix B hereto shall be deemed to have been selected.

3. To provide construction contract surety bonds to small business and minority enterprises as requested by WMATA, subject to the terms of Appendix C hereto. The premium for such bonds shall be determined in accordance with LMC's applicable manuals, rules and rates in effect at the time of issuance. The premium and any SBA fee shall be payable by the principal under such bonds.

4. To accept NATLSCO and its claim and loss control service as meeting LMC's requirements set forth on the page of Appendix hereto, entitled "Special Servicing Requirements."

SECTION B. NATLSCO AGREES:

1. To provide workmen's compensation and general liability insurance loss control services consisting of the following:

(a) services of NATLSCO's Safety Services Division Manager on a two day per month basis to provide a periodic overview and evaluation of NATLSCO's total control assistance efforts.

(b) services of a full-time resident loss control service manager to provide daily supervision and direction of NATLSCO's loss control assistance efforts.

(c) services of full-time loss control field consultants to perform regular on-site safety inspections and to provide other appropriate assistance to WMATA in the development and implementation of its Metro System Safety Program. The number of field consultants will generally be maintained at a ratio of 1 consultant for each 10 heavy construction contracts.

(d) services of industrial hygienists and occupational health consultants, where appropriate or when specifically requested by WMATA, to evaluate occupational disease exposure and to assist in the development of necessary first aid and medical facilities, procedures and records.

2. To provide workmen's compensation and general liability claim services as follows:

(a) services of a full-time resident claim service manager to provide daily supervision and direction of NATLSCO's claim service efforts.

(b) services of full-time claim supervisors, claim adjusters and claim clerical personnel in sufficient numbers to adequately handle the volume of workmen's compensa-

tion and general liability claims with respect to which insurance is afforded under the terms of this Agreement.

(c) claim reporting procedures, investigation of all reported claims, establishment of appropriate claim files and reports, authorization of claim payments, assistance to attorneys elected by LMC and other functions usual to the rendering of insurance related claim service.

3. That NATLSCO's service fee for the above-described loss control and claim services will be at the rate of $0.9377 per $100.00 of payroll. The term "payroll" means the audited workmen's compensation payroll for all employees covered under the subject LMC insurance plan for WMATA. NATLSCO will bill WMATA on a monthly basis for an amount equal to one-twelfth of its total estimated annual service fee for a given year. Final adjustment of the total annual service fee will be subject to a payroll audit. It is also agreed that the annual service fee for any given year will be appropriately adjusted for variations in actual assigned claim service manpower from that estimated in NATLSCO's "Proposed Loss Control & Claim Services to WMATA", (Appendix D, hereto).

4. That all services set forth in Appendix D hereto shall be furnished by NATLSCO and in the event of conflict between those terms and the terms set forth in the foregoing paragraphs 1 through 3, the terms of Appendix D shall control.

SECTION C. WMATA AGREES:

1. To pay all service fees, premiums and advance premiums when due, as provided in this Agreement.

2. To reasonably and faithfully perform its safety obligations, and to give good faith consideration to the

recommendations of NATLSCO in the performance of its loss control services.

3. To apply to the District of Columbia City Council for a specific waiver of a regulation limiting the cancellation of insurance policies in the District of Columbia which became effective May 1, 1971, to the extent that such regulation relates to this Agreement or to the insurance agreed to be provided herein.

SECTION D. THE PARTIES HERETO MUTUALLY AGREE:

1. That the insurance and services to be provided hereunder shall be effective at 12:01 A.M., EDT, July 30, 1971. Subject to the terms of Appendix A, on the page entitled "General Comment", and to the terms of policies of insurance issued pursuant to this Agreement, and to the terms of cancellation hereinafter provided, this Agreement shall continue in force until 12:01 A.M., EDT, July 1, 1974 whereupon it shall terminate. Provided, however, the insurance agreed to be provided under the terms of Appendix C shall be effective at such dates and shall be issued for such terms as shall be appropriate under the circumstances, and such insurance shall not otherwise be subject to the terms of this paragraph D1.

2. That this Agreement may be terminated by any party hereto by giving to the other parties written notice stating when, not less than 90 days thereafter, such cancellation shall be effective. Provided, however,

(a) Any policy of insurance issued pursuant to this Agreement may be cancelled in the manner provided in such policy, except that as respects cancellation by WMATA or by LMC of any workmen's compensation or

general liability policy, not less than 90 days notice shall be given.

(b) In the event of cancellation of this Agreement by WMATA for any reason other than a cancellation of workmen's compensation or general liability insurance by LMC, WMATA agrees to fully reimburse NATLSCO for its various unrecovered start-up expenses incurred in the establishment of special office facilities and staff in Washington, D.C. These will amount to $218,000 if cancellation is made during the first year and then decreasing uniformly down to $28,000 at the end of the second year. Provided, however, that this subparagraph (b) shall not apply to any cancellation by WMATA effective on or after July 30, 1973.

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be signed and attested on their behalf by their duly authorized officers under their respective corporate seals on the day first above written.

ATTEST:	WASHINGTON METROPOLITAN TRANSIT AUTHORITY
/s/ [Illegible] Title: Asst. Sec.	By /s/ Selmer Ison Title: Contracting Off.
ATTEST:	LUMBERMENS MUTUAL CASUALTY COMPANY
/s/ [Illegible] Title: Secretary	By /s/ [Illegible] Title: Vice President
ATTEST:	NATIONAL LOSS CONTROL SERVICE CORPORATION
/s/ [Illegible] Title: Secretary	By /s/ [Illegible] Title: President

No. 82-2084

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

GEORGE W. PHILLIPPI and
AVA PHILLIPPI, his wife,

Petitioners

v.

BECHTEL ASSOCIATES PROFESSIONAL
CORPORATION, D.C., *et al.*,

Respondents

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

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Incorporated

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D.C.

QUESTION PRESENTED

Whether petitioners can escape the six month limitation of § 33(b), Longshoremen's and Harbor Workers' Compensation Act, on the basis of a conflict of interest, where the same insurance carrier provided both compensation insurance and liability coverage.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

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Respondents

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit**

RESPONDENT'S BRIEF IN OPPOSITION

Respondents respectfully request that this Court deny the Petition for Writ of Certiorari to review the *per curiam* Judgment of the United States Court of Appeals for the District of Columbia Circuit (Appeal No. 82-1615), which affirmed the judgment of the United States District Court for the District of Columbia, granting summary judgment for defendants Bechtel, on the basis of the Opinion of the District Court; and the orders of the United States Court of Appeals for the District of Columbia Circuit denying petition for rehearing and denying suggestion for rehearing *en banc*.

OPINIONS BELOW

The Order of the United States District Court granting summary judgment for respondent, dated April 28, 1982,

appears as Petitioners' Appendix C. The judgment of the United States Court of Appeals for the District of Columbia Circuit, dated February 24, 1983, appears as Petitioners' Appendix B. The orders of the United States Court of Appeals for the District of Columbia Circuit denying the petition for rehearing, and denying the suggestion for rehearing *en banc* appear as Petitioners' Appendix A.

All of the foregoing orders are unreported. The Order of the United States District Court, for the District of Columbia, in *Jenkins* v. *Bechtel Associates Professional Corporation*, Civil Action 81-2236 (D.D.C. February 23, 1982), cited and incorporated by reference in the opinion of the District Court appears as Respondents' Appendix A. The Order of the United States Court of Appeals for the District of Columbia Circuit which granted a motion by respondents Bechtel to strike the reply brief sought to be filed by petitioners appears as Respondents' Appendix B. The Table of Contents of the stricken reply brief appears as Respondents' Appendix C.

JURISDICTION

Petitioners seek to invoke the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1)(1976). Respondents do not disagree with the applicability of that provision.

With respect to the time factors upon which jurisdiction may rest, petitioners apparently rely upon Rule 11 of the Rules of this Court, and upon 28 U.S.C. § 2101(c), although same are not specifically cited by petitioners. Respondents do not controvert the petition on the basis of timely filing.

RELEVANT STATUTES

Respondents agree that the relevant statutory provisions include the following, set forth by petitioners:

District of Columbia Code § 36-501
United States Code Title 28, § 1254(1)
United States Code Title 33, § 933(b)(pre 1959 and post 1959 amendment versions)

Respondents also cite:
District of Columbia Code § 36-301, et seq. and 335 (1981 ed.)

Respondents do not agree that other provisions cited by petitioners are relevant to the issues presented.

STATEMENT OF THE CASE

George W. Phillippi, a miner and concrete foreman, alleged an occupationally-related lung disease, allegedly discovered in June, 1978, while he was employed by a contractor on the Washington Metro subway project. He retained the same counsel who now represent him in this action, and filed a compensation claim against Ball-Healy-Granite, as his employer, in 1978.

On September 4, 1980, petitioner received an award of benefits under the Longshoremen's and Harbor Workers' Compensation Act (hereinafter referred to as the Act), 33 U.S.C. § 901 et seq., made applicable in the District of Columbia by D.C. Code § 36-501 et. seq.

The action against the Bechtel defendants, general construction consultants for Washington Metropolitan Area Transit Authority (hereinafter referred to as WMATA) was not filed by plaintiffs until May 18, 1981.[1]

Defendants Bechtel moved for dismissal or summary judgment, on the grounds that Mr. and Mrs. Phillippi are barred from pursuing the action, since the right to pursue any third party action was assigned to the employer of Mr. Phillippi, or its compensation insurance carrier under subrogation principles, six months after the date of the award, pursuant to the provisions of § 33(b) of the Act. The motion was granted, with a Memorandum Opinion by Honorable Louis F. Oberdorfer, and judgment entered for defendants.

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[1] Respondents specifically disagree with the characterization of the responsibilities of defendants, at Petition, pp. 7-8. These conclusory allegations come from plaintiffs' Complaint in the District Court, and were denied as phrased by respondents.

On appeal to the United States Court of Appeals for the District of Columbia Circuit, petitioners sought to raise, in a Reply Brief, several of the same points, or variations thereof, as found in the Petition for Writ of Certiorari.[2] Upon motion of respondents, the Reply Brief was stricken in its entirety.[3]

As indicated by petitioners, the Court of Appeals then entered judgment affirming the District Court, on the basis of the District Court opinion. Petition for rehearing, and suggestion for rehearing *en banc*, were denied.

SUMMARY OF ARGUMENT

This petition should be denied for a number of reasons.

The petition is based, in part, on arguments, issues, documents and decisions not presented to the District Court and the Court of Appeals. The Court of Appeals ordered a reply brief by petitioners stricken because it sought to introduce new issues. This Court should disregard matters not raised before the Courts below, since their inclusion is not only unfair but prejudicial to respondents.

The only issue before this Court is whether this case presents any "specific evidence of a serious conflict of interest which Congress could not have foreseen when it enacted and amended § 33." *Rodriguez* v. *Compass Shipping Co., Ltd.*, 451 U.S. 596, 618 (1981).

Respondents submit that the District Court and the Court of Appeals have correctly found that the conflict of interest here is almost precisely the same as that found by this Court in *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956). The Courts below also correctly held that such a conflict of interest

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[2] The Table of Contents of the stricken Reply Brief appears as Respondents' Appendix C.

[3] The Order of the Court of Appeals striking the Reply Brief appears as Respondents' Appendix B.

not only could have but actually was foreseen by Congress when it amended § 33(b) of the Act in 1959.

Therefore, the reliance of petitioners on the rationale of the *Czaplicki* decision is no longer warranted. Mr. and Mrs. Phillippi are bound by the operation of the six month assignment provision of the statute. There is no evidence of an unforeseen conflict of interest, and the petition must be denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. The Petition Should Be Denied Because It Is Based On Arguments, Issues, Documents And Decisions Not Before The Courts Below.

As noted above in Respondents' Statement of the Case, petitioners sought to rely on arguments and issues, based on documents and decisions not previously in the record, on their appeal of the decision of the District Court. The United States Court of Appeals for the District of Columbia Circuit struck the Reply Brief in which those matters were contained.

The same rationale should be applied upon consideration of this Petition for Writ of Certiorari.

Petitioners, in the Court of Appeals, framed the issue presented for review as follows:

> "Whether an injured employee may prosecute a personal injury action against a third party after his claim has been assigned to this employer pursuant to § 33(b) of the Longshoremen's and Harbor Workers' Act, where the assignee failed to prosecute the assigned claim because of an unusual conflict of interest."

Respondents have conceded throughout that, at all relevant times, Lumberman's Mutual Casualty Company provided compensation coverage to Ball-Healy-Granite, employer of Mr. Phillippi, and liability insurance to respondents.

No reference was made in the courts below to §§ 904(a), 905(a), 933(d), 933(e)(2), 933(e)(1)(A-D), or 938(a), 33 U.S.C. The agreement between WMATA, National Loss Control

Service Company (hereinafter referred to as NATLSCO), and Lumberman's Mutual Casualty Company first appears in Petitioners' Appendix in this Court, and was not before the courts below.

The argument of petitioners found in Section B, Petition, pp. 16-18, was not made before the District Court or the Court of Appeals. Likewise, the characterizations of the WMATA Coordinated Insurance Program found in Section A, Petition, pp. 9-15, were not presented below, and are not based on facts in the record before the Courts below.

Respondents here are two Bechtel entities. WMATA, which allegedly "engineered" the Coordinated Insurance Program (Petition, p. 15) is not a party, nor is NATLSCO, nor Lumberman's Mutual Casualty Company nor Ball-Healy-Granite. To allow petitioners here to characterize the intentions of nonparties is not only prejudicial to respondents, but improper and unfair. Further, to allow petitioners to advance conclusory statements as to what the members of Congress in 1959 did or did not intend in amending the Act, without basis in the record, is likewise improper, unfair and prejudicial to these respondents. Most important, these characterizations, and the Coordinated Insurance Program, are not the issue here.

Matters concerning which there was no record developed in the Court below cannot be considered on appeal. *Moses* v. *Hazen*, 69 F. 2d 842 (D.C. Cir. 1934). Questions neither raised nor considered in the trial court, and which are attempted to be raised for the first time on appeal, will not and should not be considered by the reviewing Court. *Brown* v. *Collins*, 402 F. 2d 209 (D.C. Cir. 1968); *Kassman* v. *American University*, 546 F. 2d 1029 (D.C. Cir. 1976); *Calhoun* v. *Freeman*, 316 F. 2d 386 (D.C. Cir. 1963).

In *Hormel* v. *Helvering*, 312 U.S. 552 (1941), this Court explained that this is "essential in order that parties may have the opportunity to offer all the evidence they believe relevant to the issues . . . [and] in order that litigants may not be surprised on appeal by final decision there of issues upon which

they have had no opportunity to introduce evidence." *See also*, *Youakim* v. *Miller*, 425 U.S. 231 (1976); *Hackes* v. *Hackes*, 446 A. 2d 396 (D.C. App. 1982).

Attempts to characterize the intentions of nonparties have no place in the consideration of the real issues of this case, nor do unfounded assertions that a conflict of interest was "deliberately created" to "frustrate" Mr. and Mrs. Phillippi.

The arguments and issues, based on documents and decisions not previously in the record, should be disregarded. Inasmuch as petitioners concede the operative facts and chronology, concede the applicability of the 1981 decision of this Court in *Rodriguez* v. *Compass Shipping Co., Ltd., supra*, and concede that the 1959 amendments of the Act superceded the decision of this Court in *Czaplicki* v. *The Hoegh Silvercloud, supra*, (1956), the Petition should be denied.[4]

II. An Employee May Not Prosecute A Personal Injury Action Against A Third Party After His Right To Do So Has Been Assigned To His Employer Pursuant To § 33(b) Of The Act.

A. Relevant Considerations Supporting Review On Certiorari Are Not Present In This Case.

Petitioners address themselves to the discretion of this Court. Rule 17, Rules of the Supreme Court of the United States, sets forth the "character of reasons" to be considered, and points out that review will be granted "only where there are special and important reasons therefor."

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[4] Counsel for petitioners, in argument before the United States Court of Appeals for the District of Columbia Circuit on January 7, 1983, conceded that the decision of this Court in *Rodriguez* v. *Compass Shipping, Ltd., supra*, overrules *Czaplicki* v. *The Hoegh Silvercloud, supra*, as applicable to the facts of this case. From recollection, the phrase used by counsel was that *Czaplicki* was "wiped out" by the 1959 amendments plus the decision of this Court in *Rodriguez*.

Respondents submit that there are no reasons in this case, and that the Petition should be denied. Petitioners point to no conflict between the decisions of the Court below and any other Federal Court of Appeals, and there is none. *See* Rule 17.1(a), Supreme Court Rules. Nor is there any conflict with the decision of a state court of last resort. *See* Rule 17.1(b), Supreme Court Rules.

The decision of the United States Court of Appeals for the District of Columbia Circuit, in this case, does not conflict with applicable decisions of this Court, nor has the Court of Appeals decided an "important question of federal law" not settled by this Court. *See* Rule 17.1(c), Supreme Court Rules.

Significantly, petitioners state directly no claim or representation, in their petition, that the decision of the District Court, upon which the *per curiam* judgment of the Court of Appeals was based, presents this Court with such conflict or unsettled question.

Petitioners refer (Petition, p. 14, note 3) to the recent Opinion of this Court in *Pallas Shipping Agency, Ltd.* v. *Duris*, #82-502, slip opinion at 3, n.1 (May 23, 1983), and claim that a citation of *Czaplicki* v. *The Hoegh Silvercloud*, *supra*, in that case is evidence of its "continuing vitality." Review of the cited footnote does not support petitioners. The citation follows a reference to § 919(c) of the Act, under which the Deputy Commissioner may be required to issue a compensation order. No conflict of interest question is raised by the facts of *Pallas Shipping Agency, Ltd.* v. *Duris*, *supra*, and the mention of *Czaplicki* in that case presents no support for the Petition filed in this case.

Petitioners also refer to *Susino* v. *Hellenic Lines. Ltd.*, 551 F. Supp. 1080 (E.D.N.Y. 1982). The District Court, in that case, omitted from its analysis any determination as to whether the facts of that case presented evidence of a conflict of interest "which Congress could not have foreseen" when it amended the Act in 1959. *Rodriguez* v. *Compass Shipping Co., Ltd.*, *supra* at 618. That omission renders the opinion of ques-

tionable value, even though counsel for defendant Hellenic Lines, Inc. has advised that appeal will not be pursued, the case having been disposed of by agreement between the parties.

Respondents submit that *Susino* v. *Hellenic Lines, Ltd., supra*, involves facts very different from the facts of this case. There, the employer and the third party were one and the same entity. Here, George Phillippi never worked for Bechtel, but worked for Ball-Healy-Granite and other contractors on the Metro subway system. The *Susino* case is therefore distinguishable on its facts, and does not lend support to petitioners here.[5]

In *Dodson* v. *Washington Automotive Company*, #81-1466, slip op., May 16, 1983, the District of Columbia Court of Appeals, in a case in which the same counsel who represents petitioners represented Mr. Dodson, affirmed a dismissal of a claim brought by an employee more than six months after an award, noting and disposing of many ancillary questions also raised in this case.

Although no conflict of interest question was presented, the Court rebuffed an argument that the six month limitation of § 933(b) violated the intent of the Act to benefit employees. The Court also discarded the employee's argument that the opinion of this Court in *Rodriguez* v. *Compass Shipping Co., Ltd., supra*, was not binding on the District of Columbia Court of Appeals.

The Court, in *Dodson*, held that all provisions of the Act are made binding in the District of Columbia by D.C. Code § 36-

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[5] In *Jones & Laughlin Steel Corporation* v. *Pfeifer*, #82-131, slip op. June 15, 1983, this Court determined that where the stevedore and the vessel owner were one and same entity, an employee who recovered compensation and made a timely claim for damages for negligence was entitled to recover both remedies. Here, it is undisputed that Bechtel is an entirely different entity from petitioner's employer, Ball-Healy-Granite.

501, and cited with approval the statement by this Court, in *Rodriguez, supra*, at 612, that the Act was designed to benefit all parties, not just employees. Indeed, petitioners here concede that the Act was intended to protect the interests of all participants (Petition at 13).

Effective July 26, 1982, the District of Columbia has a new compensation statute, D.C. Code § 36-301 et seq., (1981 ed.). The new statute, thrashed out after intense public debate, provides, in § 36-335 the same provisions found in § 33(b) of the Act.

The Council of the District of Columbia, and Congress in its oversight capacity, legislated no conflict of interest exception to the statute.

Cases cited and relied upon by petitioners do not provide any basis for this Court to grant this Petition. As pointed out in greater detail below, the decisions of the Courts below correctly interpreted the opinion of this Court in *Rodriguez* v. *Compass Shipping Co., Ltd., supra*. None of the provisions of Rule 17 of the Rules of this Court are applicable, and the Petition should be denied.

B. The Reliance Of Petitioners On The Czaplicki Decision Is Not Warranted.

Petitioners, in the District Court, and again in their appeal to the United States Court of Appeals for the District of Columbia Circuit, have conceded that the material facts submitted by defendants on the original motion in the District Court are uncontested, and have further conceded that the decision of this Court in *Rodriguez* v. *Compass Shipping, Co. Ltd., supra*, is applicable to those facts, precluding the third party action commenced by Mr. and Mrs. Phillippi since it was not brought within six months of the compensation award to the male plaintiff.

In an effort to escape the clear requirements of the statute, and the correct rationale of the decisions of the Courts below interpreting that statute, petitioners have asserted that the

clear mandate of the statute should be disregarded or suspended to allow their action to proceed. The reliance of petitioners on the 1956 decision of this Court in *Czaplicki* v. *The Hoegh Silvercloud*, *supra*, to support that assertion, is not warranted in light of legislative amendments and later decisions, particularly the decision of this Court in *Rodriguez* v. *Compass Shipping Co., Ltd.*, *supra*.

At the time Mr. Czaplicki was injured, § 33(b) of the Act provided that an employee injured in the course of employment was forced to make an election *either* to accept compensation *or* to sue a third party. If the employee elected to receive and accept a compensation award, the right to sue the third party was immediately assigned to the employer, or the subrogated compensation carrier.

In *Czaplicki*, the plaintiff elected to accept the compensation award. His right to sue third parties was thus immediately assigned to the employer, or the carrier subrogated to the employer's rights under the Act. The same carrier in that case insured one of the potential third parties. This Court, under "the peculiar facts" of the case, construed the Act, as it then existed, to allow the employee to commence a third party action in his own name despite the assignment.

This Court expressed its rationale for that decision, which is no longer applicable after the 1959 amendments, as follows:

> "*Czaplicki* can bring suit not because there has been no assignment, but because in the peculiar facts here there is no other procedure by which he can secure his statutory share in the proceeds, if any, of his right of action. For the same reason, we hold that the election to accept compensation, as a step toward the compensation award, does not bar this suit." 351 U.S. at 532-533.

As pointed out, when this Court next approached the subject twenty-five years later in *Rodriguez*, it found that the Court in *Czaplicki* had emphasized the limited nature of its holding at several places. *See Rodriguez* v. *Compass Shipping Co., Ltd.*, *supra*, notes 19 and 20.

Subsequent to *Czaplicki*, Congress amended Section 33 in 1959, inserting the present language and the present arrangement between employee, employer and third party. The Act was amended to make clear that the employee no longer need to make an election between acceptance of compensation and suit against a third party. Now, the employee may receive compensation and pursue his claims against third parties.[6]

In 1959, § 33(b) was amended to postpone the assignment of the right to sue third parties for six months from the date of the award. At the same time, as pointed out by petitioners, § 33(e) was modified to allow an employer or subrogated carrier to retain one-fifth of the new proceeds of a third party action successfully pursued by it, with the employee retaining four-fifths.

The legislative history of those 1959 amendments was reviewed by this Court in detail in *Rodriguez* v. *Compass Shipping Co., Ltd., supra*, 451 U.S. at 607-612, and at footnotes 21-29. That discussion makes clear that the 1959 amendments were fashioned by Congress after a review not only of the "peculiar facts" of *Czaplicki*, but also in light of *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.*, 350 U.S. 124 (1956). That decision held that a third party ship owner, faced with a suit by the employee could assert a claim over for indemnity against the employer. That holding had been interpreted by the United States Court of Appeals for the Third Circuit in *Johnson* v. *Sword Line, Inc.*, 257 F. 2d 541 (1958) to create a conflict between the interest of the employer-carrier in recouping the

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[6] In the context of this case, it must be noted that George W. Phillippi was advised by his doctor of an allegedly work related pulmonary problem at least as early as June, 1978. Since the Act no longer requires that he elect between his remedies, he could have commenced this action at any time after June, 1978, and up to March 4, 1981, the last day of the six-month period which began to run with his award. This is a total period of over two and one-half years. The six month period provided by § 33(b) of the Act is, therefore, not a statute of limitations in the traditional sense.

compensation benefits paid to the employee, and their interest in avoiding the risks that their liability for indemnity might be substantially greater than the amount of those benefits.

> "The Court of Appeals reasoned that the stevedore's potential liability under the indemnity claim authorized by *Ryan Stevedoring* had the practical effect of enlarging the conflict of interest rationale of *Czaplicki*, which had narrowly rested on the peculiar facts of that case, to encompass substantially every case in whch a stevedore failed to bring a third party action." *Rodriguez* v. *Compass Shipping Co., Ltd., supra*, at 608.

The legislative history which led to the 1959 amendments clearly focused on the broader issues presented by *Ryan Stevedoring*, together with the narrower issue presented by *Czaplicki*. That history began with hearings on May 23, May 24, and June 11, 1956 before a special subcommittee of the House Committee on Education and Labor, on bills relating to the Act, during the Eighty-Fourth Congress, Second Session, hereinafter referred to as House Hearings. Those Hearings focused on various bills which eventually evolved into the 1959 amendments.

Congressman Herbert Zelenko of New York, a member of the Education and Labor Committee, and a sponsor of one of the bills, after inserting a copy of the *Ryan* decision into the record, (House Hearings at 1) testified:

> "Developments under the Act which concerned the Subcommittee on Safety and Compensation have been . . . the automatic assignment of a third party cause of action to the employer and the refusal by the employer to pursue the third party claim because of a conflict of interest . . ."

This Court in *Rodriguez, supra*, summarized the results of the 1959 amendments as follows:

> "In 1959 Congress acted to remedy the problems created by the potential conflict between the interests of the employer and the employee in prosecuting third party claims. Its solution was not to create or to define an exception to the assignment by operation of law. Rather, Congress substantially adopted the central provisions of the

Zelenko bill by amending § 33(b) to postpone the assignment by operation of law until six months after the acceptance of compensation under an award, and by amending § 33(e) to allow an employer to retain one-fifth of the net proceeds of its successful third party action. The effect of the six month provision, of course, was to give the longshoreman an unqualified right to bring a third party action during the six month period . . . Moreover, *by bringing his own action, the longshoreman could avoid the risk that his employer's potential conflict of interest—or possibly erroneous evaluation of the merits of the claim—might result in its abandonment . . .*

Nothing in the 1959 amendments purports to preserve the employee's right to commence a third party suit after the six month period expires. Although the amendments encourage employers to pursue assigned claims, they do not qualify the assignee's control of the cause of action after the assignment takes place. To the contrary, the legislative history indicates that once the six month period expires, the employer possesses complete control of third party claims.

This history forcloses the argument that Congress did not intend an assignment of a third party claim to be effective unless there was an absence of any potential conflict of interest between the assignee and the longshoreman. The statutory language provides a different and clearly defined solution to the conflict-of-interest problem that had been created by *Ryan Stevedoring*. Congress unequivocally made the choice in favor of first giving the employee exclusive control of the cause of action for a six month period, and then giving the employer exclusive control thereafter, instead of opting for any form of simultaneous joint or partial control. The simple standard set forth in § 33(b) protects the interests of both employees and employers, and is consistent with the general policy of the Act to encourage the prompt and efficient administration of compensation claims." 451 U.S. at 610-612. (Citations omitted) (Emphasis ours)

Petitioners initially conceded that, as analyzed, *Rodriguez* "undercut somewhat" the rationale of Czaplicki, in their Opposition to the Motion For Summary Judgment in the District Court. In fact, the amendments eliminated any justification for

reliance on that decision as even petitioners' counsel conceded before the Court of Appeals.

This Court was not required, on the particular facts before it in *Rodriguez*, to decide whether there were any vestiges of validity in the *Czaplicki* decision, but did make it clear that Congress, in resolving the broader conflict questions raised by *Ryan Stevedoring* also was completely aware of and resolved the narrower conflict exception set up by the "peculiar facts" of *Czaplicki*.

> "As our analysis indicates, the 1959 and 1972 amendments have substantially undercut the basis for the *Czaplicki* exception to § 33(b). The Court was troubled in *Czaplicki* because under the Act in 1956 there was "no other procedure" by which a longshoreman could enforce his right against a third party where the employer failed to sue due to a conflict of interest. 351 U.S. at 532-533, 100 L.Ed. 1387, 76 S. Ct. 946. After the 1959 amendments there is such a procedure: The employee may file his own third party suit within six months after accepting compensation.
>
> Similarly, to the extent that *Czaplicki* and its progeny sought to mitigate the conflict of interest created by *Ryan Stevedoring*, the 1972 amendments eliminate the need for judicially created exception to § 33(b) . . ." 451 U.S. 617, note 41.

The legislative history makes it clear that Congress had both *Czaplicki* and *Ryan* brought to its attention while the 1959, and later the 1972 amendments were being fashioned. It is also clear that the 1959 and 1972 amendments afforded to the injured employee a procedure by which he could enforce his rights against the third party, and control the third party action, no matter how complex the contractual arrangements in which his employer and other entities might have participated, and no matter what the extent or source of the conflict of interests might be.

George W. Phillippi and his wife had control of their claim against these defendants from June 1978 until March 1981. No potential third party could have claimed a defense under

§ 933(b) of the Act if this action had been commenced against any assortment of third parties during that time, although Ball-Healy-Granite and Lumberman's Mutual could enforce a lien for compensation benefits paid pursuant to the award of Mr. Phillippi.

In overruling the decision of the Court of Appeals for the Fourth Circuit, in *Caldwell* v. *Ogden Sea Transport, Inc.*, 618 F.2d 1037 (4th Cir. 1980) in which that Court had held that the employee retained a right after assignment to compel the assignee to bring a third party suit or to re-assign the cause of action to the employee, this Court held, in *Rodriguez:*

> "The predicate for the Fourth Circuit's analysis was an assumption that Congress did not intend to allow the longshoreman to lose his right against a third party simply because (a) he failed to take any action within six months, and (b) his employer decided not to sue the third party thereafter. To avoid the "practical problem" presented in such a situation, the Court fashioned a "solution" that the Act "does not specifically provide." *Id.*, at 1045. *We are persuaded that the reason Congress did not specifically provide the solution which the court readily found is that Congress did indeed intend to require the employee either to act promptly or to accept the consequences of an assignment of his claim to the employer. One of the consequences of such an assignment is the risk that the employer will choose not to sue.* The comprehensive character of the procedures outlined in the Act precludes the fashioning of an entirely new set of remedies to deal with an aspect of a problem that Congress expressly addressed. The fact that parties sometimes fail to assert meritorious claims within the period authorized by law is not a sufficient reason for refusing to enforce an unequivocal statutory bar." 451 U.S. at 613-614. (Emphasis ours)

Since the employee is afforded control of his own destiny, the conflict of interest exception has no further viability, nor is it needed to protect the employee.

Respondents submit that the decision of the Courts below is correct and the petition should be denied.

C. The Facts Of This Case Present No Specific Evidence Of An Unforeseen Conflict Of Interest.

Petitioners attempt to escape the clear dictates of the act by alleging that there is something "unique" or "complex" about the contractual relationships on the Metro subway project where plaintiff was employed, and therefore something unique about the conflict of interest issue here.

This Court, in *Rodriguez, supra*, outlined the proper question as follows:

> "The notion adopted in some post-*Czaplicki* decisions that a conflict of interest may be presumed whenever an employer does not sue on an assigned claim is simply untenable in light of the plain statutory language and the history of the 1959 and 1972 amendments. We leave for another day the question whether an assignment under § 33(b) will bar a longshoreman's third party action if there is specific evidence of a serious conflict of interest Congress could not have foreseen when it enacted and amended § 33." 451 U.S. at 618.

Respondents have previously pointed out that there is no question that Lumberman's Mutual Casualty Company was the compensation carrier for Ball-Healy-Granite and the liability carrier for defendants, at all relevant times. That fact was conceded and in fact referred to by the District Court. The situation is thus almost exactly parallel to the *Czaplicki* situation.

Counsel for petitioners have made these same arguments, without success, in other actions against Bechtel, where plaintiffs did not sue within six months of a compensation award.

In *Jenkins* v. *Bechtel*, Civil Action 81-2236 (D.D.C. February 23, 1982), Judge Flannery considered these arguments at length, and discarded them in granting summary judgment for Bechtel. The Opinion of Judge Flannery, from which no appeal was taken, is set forth in full in the Appendix to this Brief for Respondents.

In *Jenkins*, the Court held:

> "Finally, even if it is conceivable that the [Supreme Court] will, in the future, recognize some specific conflict of interest exceptions to § 33(b), there is scant likelihood that it will continue to recognize an exception for the precise conflict of interest involved in *Czaplicki, i.e.*, where the employer and third party have an identical insurer. The Court stated that it would postpone decision on the question of "whether an assignment under § 33(b) will bar a longshoreman's third party action if there is specific evidence of a serious conflict of interest Congress could not have *foreseen* when it enacted and amended § 33(b)." 101 S. Ct. at 1958 (emphasis added). This statement indicates that while some as yet unimagined conflict of interest *may* be found to justify an exemption from § 33(b)'s dictates, the specific conflict presented in *Czaplicki* could no longer qualify for such an exemption. The reasoning underlying this conclusion is obvious: Since *Czaplicki* predated the 1959 amendments, Congress' decision not to incorporate any exception into the revised § 33(b), reflects a clear legislative judgment that, at a minimum, the particular conflict of interest involved in *Czaplicki* should not limit the automatic and complete assignment of the employee's rights to the employer once the six-month period has expired. Since the conflict of interest motivating *Czaplicki* is the same one presented in the instant case, *Rodriguez*' statement of the issue reserved for future consideration, as well as the factors causing the Court to frame that issue in the manner it selected, necessitate the conclusion that plaintiff's suit is time-barred."

Petitioners have cited the decision of Honorable Louis F. Oberdorfer in the Court below. In granting summary judgment for defendants Bechtel, and adopting the decision by Judge Flannery in *Jenkins*, *supra*, Judge Oberdorfer went on to hold:

> "While the arrangements appear complex, there is no suggestion that their complexity was a product of any ulterior motive. They are a side effect of an ordinary

business necessity of a large undertaking." Memorandum Opinion at 3.[7]

Certainly, a conflict of interest essentially identical to that found in *Czaplicki* was foreseen and reviewed by Congress when it amended § 33. Therefore, petitioners can no longer rely on a conflict of interest exception based on *Czaplicki*, and the Petition should be denied.

D. An Employer Is Not Required To Take Any Action To Pursue An Assigned Third Party Claim.

Petitioners argue that "a strict interpretation" of § 33(b) of the Act requires an employer to take "some action" to pursue an assigned claim (Petition, pp. 16-18), and points to § 33(e)(2) as encouragement of that pursuit.

Respondents concede that § 33(e)(2) of the Act might encourage an employer, but points out that § 33(b) uses the permissive "may," not the obligatory "shall."

This Court recognized in *Rodriguez* that one of the consequences faced by an employee who does not sue the third party, and loses his case by assignment, is that the employer or subrogated carrier may not choose to bring suit. In balancing the equities between employee, employer and third party, Congress afforded complete control of his own destiny to the employee for six months.

After that time, the employee must bear the burden of a decision by the employer not to bring suit, whether that decision is based on a conflict of interest, slumbering on its rights, an independent judgment that suit is not worthwhile, or whatever other reason the employer may have, in its judgment.

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[7] In this case, Judge Oberdorfer allowed plaintiffs to conduct supplemental discovery with regard to the relationship between Bechtel, NATLSCO, WMATA and Lumberman's Mutual. The motion of defendants was granted after plaintiffs had full opportunity to supplement the record on this point. *See* Memorandum Opinion of the District Court at pages 2-3. (Petitioners Appendix C)

To engraft a conflict of interest exception, exactly parallel to the *Czaplicki* fact situation, onto the statutory scheme as reconstructed by Congress in 1959 and 1972 is unwarranted. The District Court and the Court of Appeals have properly refused to do so, and this Petition should therefore be denied.

CONCLUSION

For the reasons set forth above, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-2084

GEORGE W. PHILLIPPI and
AVA PHILLIPPI, his wife,

Petitioners

v.

BECHTEL ASSOCIATES PROFESSIONAL
CORPORATION, D.C., *et al.*,

Respondents

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia Circuit

CERTIFICATE OF SERVICE OF RESPONDENTS' BRIEF IN OPPOSITION

This will certify that on this ____ day of July, 1983, three copies of the Respondents' Brief in Opposition were mailed, first class with postage prepaid, to William F. Mulroney, counsel of record for Petitioners.

GARY W. BROWN
(Counsel of Record)

APPENDIX

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-2236

GEORGE H. JENKINS,

Plaintiff,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORP. *et al.*,

Defendants.

FILED
FEB 23 1982
JAMES F. DAVEY, Clerk

MEMORANDUM OPINION

This matter comes before the court on defendant's motion for summary judgment. Defendant argues that this third-party negligence action is time-barred by section 33(b) of the Longshoremens and Harbor Workers Compensation Act (LHWCA), 33 U.S.C. § 993(b)[1] because plaintiff failed to bring suit within six months after he received a compensation award. The court agrees.

FACTS

The material facts are not in dispute. Plaintiff hurt his knee on a steel pipe while performing work for his employer, Perini, Horn, Morrison-Knudson (Perini). On September 15, 1980, the Deputy Commissioner of the Office of Worker's Compensation Programs entered an order approving a compensation settlement between the plaintiff and Perini; the approved award was

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[1] The LHWCA was made applicable to the District of Columbia by D.C. Code §§ 36-501 *et seq.* (1973 Ed.).

paid in full on September 18, 1980. The instant suit against Bechtel Corporation, the general contractor charged with overseeing conditions at WMATA worksites, was filed on September 15, 1980, over six months after the Deputy Commissioner's order approving the compensation settlement.

The contract between Perini and WMATA required WMATA to provide for Perini's workmen's compensation; the insurance carrier selcted was Lumbermen's Mutual Casualty Company, a Kemper subsidiary. WMATA also secured workmens compensation insurance for Bechtel Corporation and again selected Lumbermen's. As might be expected, Lumbermen's has not initiated legal proceedings against Bechtel.

DISCUSSION

Plaintiff's opposition to defendant's motion relies primarily on *Czaplicki* v. *The S.C. Hoegh Silvercloud*, 35 U.S. 530 (1956). That case involved a factual context quite similar to the one at bar. The plaintiff was injured during his employment and elected to accept compensation benefits. Section 33(b) of the LHWCA, at that time, provided that an acceptance of a compensation award had the immediate effect of assigning any rights the employee may have against a third party to the employer. Because the employer was insured by Travelers Insurance Company, the employees rights were effectively assigned to Travelers; section 33(i) of the Act provided that the insurance company of the employer was subrogated to all of the rights of the employer.[2] Travelers was also the insurer, however, of Hamilton, one of the third parties potentially subject to suit. The result, according to the Court, was that "Czaplicki's rights of action were held by the party most likely to suffer were the rights of action to be successfully enforced." 350 U.S. at 530. The Court held, that in such circumstances, the employee did not irrevocably forfeit his rights against third parties by accepting a compensation award. The Court avoided the seem-

[2] Section 33(h), 33 U.S.C. § 933(h), of the modern Act is the parallel provision.

ingly unequivocal terms of section 33(b) by reading into the provision a presupposition that "the assignee's interest will not be in conflict with those of the employee, and that through action of the assignee the employee will obtain his share of the proceeds of the right of action, if there is such a recovery." *Id.* at 531.

Subsequent to *Czaplicki*, in 1959, Congress amended section 33(b) of the LHWCA. The amendment postponed the assignment of the employee's claims to the employer until six months after the acceptance of compensation:

> (b) Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

33 U.S.C. § 933(b). At the same time, Congress modified section 33(e) to allow an employer to retain one-fifth of the net proceeds of a successful third-party action, 33 U.S.C. § 933(e), and amended section 33(a) to clarify that an employee no longer needed to make an election between his statutory right to compensation from his employer and his claim against a third party. 33 U.S.C. § 933(a).

The Supreme Court addressed the effect and meaning of the 1959 amendments for the first time in *Rodriguez* v. *Compass Shipping, Ltd.*, ___ U.S. ___, 101 S.Ct. 1945 (1981). *Rodriguez* involved three injured seaman who had accepted compensation awards from the employer-stevedore pursuant to compensation orders; more than six months later, when it became clear that the stevedores would not exercise their assigned rights, the plaintiffs brought negligence actions against the shipowner. In holding that the plaintiffs' claims were time-barred by section 33(b), the Court stressed that the 1959 Amendments provided for a mandatory assignment of the employee's rights against third parties to the employer following the passage of six months from the time of the compensa-

tion order. 101 S.Ct. at 1950. The Court noted that the legislative history of the Amendments revealed no Congressional intention to have the effectiveness of the assignment depend upon whether the employer eventually exercised the right to sue. 101 S.Ct. at 1954. The Court also rejected the contention that an inherent conflict of interest between the stevedoring company and the shipowner somehow narrowed the effect of the statutory assignment provisions.[3]

Rodriguez expressly left open the central issue involved in this case: whether a plaintiff demonstrating a specific conflict of interest, as in *Czaplicki*, retains any rights against third parties following the six-month period. 101 S.Ct. at 1958. Even so, it is clear that the Court's analysis of the 1959 Amendments and reflections on the continuing validity of *Czaplicki* compel this court to dismiss the instant suit.

First, the Court's general discussion of section 33(b), as amended in 1959, reveals its conviction that Congress intended to completely and unqualifiedly terminate an employee's rights against third parties as soon as six months elapsed from the date of an award order. For example, the Court noted that "[n]othing in the 1959 Amendments purports to preserve the employee's rights to commence a third-party suit after the 6-month period expires," 101 S.Ct. at 1959, and that "the legislative history indicates that once the 6-month period expires, the employer possesses *complete control* of third-party claims." *Id.* (Emphasis supplied). The Court further stated that "Congress unequivocally made the choice in favor of first giving the employee exclusive control of the cause of action for

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[3] This is the conflict of interest that was created by the holding in *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124 (1956) that a shipowner liable to a longshoreman could assert a claim for indemnity against the employer-stevedore. Parantheticaly, this same conflict was essentially eliminated by the 1972 amendments to the LHWCA; section 5(b), as amended, terminates the vessel's rights to sue the stevedore on an indemnity theory. 33 U.S.C. § 905(b).

a 6-month period and then giving the employer exclusive control thereafter, instead of opting for any form of simultaneous joint or partial control." 101 S.Ct. at 1955. These reflections on the mandatory and unambiguous nature of the amended section 33(b) are just as pertinent to suits where the employee can demonstrate a specific conflict of interest as to situations where the conflict of interest is somehow implicit in the structure of the statute. In both cases, "[t]he meaning of § 33(b) is plain and should be respected." 101 S.Ct. at 1957.

Strong corroborative evidence for this conclusion is found in the footnote accompanying the Court's indication that it would postpone final decision on *Czaplicki's* continuing validity:

> As our analysis indicates, the 1959 and 1972 Amendments have substantially undercut the basis for the *Czaplicki* exception to § 33(b). The Court was troubled in *Czaplicki* because under the Act in 1956 there was "no other procedure" by which a longshoreman could enforce his rights against a third party where the employer failed to sue due to a conflict of interest. 351 U.S., at 532-33. After the 1959 Amendments, there is such a procedure: the employer may simply file his own third-party suit within six months after accepting compensation.

101 S.Ct. at 1957 n.41. The Court evidently read the 1959 Amendments as evincing a Congressional intention to resolve the problems motivating the *Czaplicki* decision without sacrificing countervailing concerns. Instead of being compelled to accept an award which would effectively foreclose any possibility of recovery against a third party, the employee could accept an award and also sue the third party responsible for his injury. However, in order to also protect the employer's interests and avoid the confusion associated with joint control over the right to sue third parties, Congress enacted a strict six-month statute of limitations for employee suits. The Court's clear implication is that it would frustrate Congress' careful balancing of interests for the courts to continue to read into section 33(b) *any* conflict of interest exception. 101 S.Ct. at 1957 (when "interpreting the intent of Congress in fashioning various details of . . . [the] . . . legislative compromise[s]

[incorporated into the LHWCA], the wisest course is to adhere closely to what Congress has written").

Finally, even if it is conceivable that the Court will, in the future, recognize some specific conflict of interest exceptions to section 33(b), there is scant likelihood that it will continue to recognize an exception for the precise conflict of interest involved in *Czaplicki*, i.e., where the employer and third party have an identical insurer. The Court stated that it would postpone decision on the question of "whether an assignment under section 33(b) will bar a longshoreman's third-party action if there is specific evidence of a serious conflict of interest Congress *could not have foreseen* when it enacted and amended § 33(b)." 101 S.Ct. at 1958 (Emphasis added). This statement indicates that while some as yet unimagined conflict of interest *may* be found to justify an exemption from section 33(b)'s dictates, the specific conflict presented in *Czaplicki* could no longer qualify for such an exemption. The reasoning underlying this conclusion is obvious: since *Czaplicki predated* the 1959 Amendments, Congress' decision not to incorporate any exception into the revised section 33(b), reflects a clear legislative judgment that, at a minimum, the particular conflict of interest involved in *Czaplicki* should not limit the automatic and complete assignment of the employee's rights to the employer once the six-month time period has expired. Since the conflict of interest motivating *Czaplicki* is the same one presented in the instant case, *Rodriguez'* statement of the issue reserved for future consideration, as well as the factors causing the Court to frame that issue in the manner it selected, necessitate the conclusion that plaintiff's suit is time-barred.

CONCLUSION

The Supreme Court strongly implied in *Rodriguez* that the mandatory terms of section 33(b), as amended, would preclude a suit by an employee alleging any specific conflict of interest between the employer and the third party. Moreover, even if some unforeseen conflict of interest exception to section 33(b)

has survived the 1959 amendments and Rodriguez' interpretation of those amendments, it is clear that the particular conflict of interest involved in *Czaplicki* and the instant case can no longer justify such an exception. Accordingly, defendant's motion for summary judgment is granted.[4]

An appropriate Order accompanies this Memorandum.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

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[4] The plaintiff argues two other theories in support of his opposition which have no basis in law or fact. First, he argues that the time for filing his third-party action was tolled until he gained sufficient knowledge to support a legal claim against the defendant. Aside from the fact that *nothing* in section 33(b) provides for the tolling of the mandatory six-month time frame, plaintiff has cited no caselaw in support of his position. In contrast, the Supreme Court has recently rejected the similar argument in the Federal Tort Claims Act context that a plaintiff's failure to bring suit promptly should be excused because of his ignorance of his legal rights. *See United States* v. *Kubrick*, 444 U.S. 111 (1979). In any event, there is no evidence before the court to suggest that plaintiff did not have adequate access to factual information and legal advice with respect to potential third-party claims at the time he accepted the compensation award; thus, even if plaintiff's tolling argument has some theoretical validity, it has no applicability to the case before the court.

Second, plaintiff argues that even if his claims for compensatory damages have been assigned to his employer, he can still assert his claims for punitive damages against Bechtel. Once again, plaintiff has cited no caselaw to support this novel proposition. More importantly, it is belied by the plain language of section 33(b) which states that the employer is assigned "*all* right of the person entitled to compensation. . . ." 33 U.S.C. § 933(b) (Emphasis added).

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 81-2236

GEORGE H. JENKINS,

Plaintiff,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORP. *et al.*,

Defendants.

FILED
FEB 23 1982
JAMES F. DAVEY, Clerk

ORDER AND JUDGMENT

This matter comes before the court on defendant's motion for summary judgment. Upon consideration of the parties' arguments and submissions, and for the reasons enumerated in the accompanying Memorandum Opinion, it is, by the court, this 23rd day of February, 1982,

ORDERED, ADJUDGED and DECREED that defendant's motion for summary judgment is granted; and it is further

ORDERED that defendant's motion to compel is denied as moot.

/s/ Thomas A. Flannery
THOMAS A. FLANNERY
UNITED STATES DISTRICT JUDGE

APPENDIX B

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1615 **September Term, 1982**

Civil Action 81-01154

GEORGE W. PHILLIPPI, AVA PHILLIPPI, his wife,
Appellant,

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., *et al.*,

ORDER

On consideration of the motion of appellees to strike the reply brief of appellants and of the opposition thereto, it is

ORDERED by the Court that the aforesaid motion is granted and the Clerk is directed to return the reply brief of appellants to counsel.

This matter was presented to, and ruled upon by, the panel scheduled to hear argument on January 7, 1982. Circuit Practice prohibits revealing the members of the panel at this time.

For The Court

GEORGE A. FISHER, *CLERK*

By: Robert A. Bonner/s/
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX C

TABLE OF CONTENTS